

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION IV

CA 06-679

DONNA BRADFORD
APPELLANT

March 7, 2007
AN APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION [F408291 AND F410666]

V.

PLAZA AT THE VILLAGE,
ST. PAUL TRAVELERS COMPANIES, INC.,
AND FIRSTCOMP INSURANCE CO.
APPELLEES

AFFIRMED

Donna Bradford appeals from the denial of workers' compensation benefits. She argues that the Arkansas Workers' Compensation Commission erred in determining she failed to prove her neck injuries are work-related. We affirm the Commission's order.

Bradford worked as a waitress for appellee, Plaza at the Village. She maintains that she suffered separate work-related injuries while carrying a heavy tray of dishes on June 7, 2004, and on August 17, 2004. Bradford has preexisting conditions that were noted by the Administrative Law Judge (ALJ), primarily, fibromyalgia and degenerative disc disease. In addition, on October 22, 1998, Bradford herniated her C5-6 and C6-7 disks in an automobile accident, which caused pain, numbness, and tingling that radiated into both arms. Bradford subsequently had surgery to fuse her C5-6 and C6-7 cervical disks. She continued to seek follow-up care for this condition through 2000.

In December 2000, Bradford's treating orthopedic surgeon noted:

patient returns today continuing to experience painful features in the upper cervical area above her fusions and C5-6 and C6-7, as well as pain in the C6-7 area resultant

of minor motion at the previously fused area. X-rays today reveal a crack at the fused C6-7 area resulting in minor motion.

Dr. Feild recommended that Bradford undergo a cervical myelogram. He also opined that “because of her continuing painful features,” Bradford had not reached maximum medical improvement. Dr. Feild stated that it was probable that Bradford would require additional cervical (neck) surgery. Bradford testified that she did not remember Dr. Feild making such findings.

It appears that Bradford sought no further medical treatment for her neck until the date of the first injury she alleged in this case. The Commission adopted the Administrative Law Judge’s findings in full, determining that Bradford had suffered a recurrence of her neck problems that was not related to her work. The Commission was apparently persuaded by the testimony of Bradford’s former employer and co-workers, who testified that Bradford told them she was involved in a car accident in June, which caused her to seek chiropractic treatment for her neck.

In reviewing decisions from the Arkansas Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Whitlach v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Id.* When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Id.*

The Commission has the duty of weighing medical evidence as it does any other evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Public Employee Claims Div. v. Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992). Further,

the credibility of witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. *Shaw v. Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991). We affirm here because substantial evidence supports the Commission's denial of benefits.

I. June 5, 2004 Injury

Bradford first asserts that the Commission erred in determining that she failed to prove she suffered a compensable injury on June 5, 2004. Bradford began working for appellee as a waitress on May 4, 2004. She claims that she was first injured on Saturday, June 5, 2004, while working the four-to-midnight shift at the restaurant. Bradford testified that she and the other waitresses "worked hard" that evening because the restaurant was catering to a large party. Bradford said that, while carrying heavy trays, she experienced pain and burning in her neck that radiated down the back of her arms, although she could not recall the precise moment when she first felt these symptoms. Kathy Nelson, the restaurant's owner, was not present. Bradford said that she did not report an injury to Tina Kendall, the senior waitress, because everyone wanted to finish and leave.

Bradford said that she did not report her injury on Sunday because the restaurant was closed and she did not have Nelson's or Kendall's phone number. Both Bradford and Nelson testified that Bradford reported this injury to Nelson on Monday, June 7, as the result of a car accident. (Kendall contradictorily testified that she (Kendall) reported the injury to Nelson.) Bradford testified that she told Nelson that she must have hurt herself on Saturday; that she was bedridden, that she was in excruciating pain; and that her neck was "locked up."

Kendall could not recall but did not deny working with Bradford on June 5. Kendall testified that in June 2004, Bradford telephoned work and told her that she had "slipped two disks" in a car accident. It was Kendall's understanding that Bradford saw her chiropractor on a daily basis after the car wreck and needed neck surgery.

Kendall further testified that Bradford never needed help to carry a tray before she went to the chiropractor. However, Kendall said that for the first few days after Bradford returned to work in June, Kendall and other waitresses helped Bradford carry her trays; after that they continued to help Bradford carry the heavier trays. Kendall said that from the time Bradford returned to work until her last day of work on August 17, she complained with neck problems.

Mallory Scott is a former employee of appellee who worked as a waitress with Bradford. She testified that she “heard” Bradford was involved in a car accident in June 2004 but she never heard that Bradford had injured herself at work on June 5. Scott said that when Bradford returned to work after the June incident, she was unable to lift anything heavy for a while because it caused her pain and discomfort in her upper neck area. Scott also said that Bradford complained of neck pain from the time she returned until she left on August 17. Scott testified that Bradford told her she was going to have surgery in August for “crushed vertebrae.”

On June 7, 2004, the same day that Bradford reported an injury, she saw Dr. Clay Berger, a chiropractor. Bradford reported to Dr. Berger that she had neck-fusion surgery in 1998. Dr. Berger noted that Bradford complained of severe spasms and bilateral neck pain that radiated mainly into her right arm and fingers. He further noted that Bradford’s neck “is red and obviously swollen.”

Bradford reported the onset of symptoms as “today, getting worse, (flare-up at work).” However, Dr. Berger also noted that, “Pt. states that her neck flare-up happened while working as a waitress but did not report it/did not want it reported because she was afraid of loss of her job.” Bradford missed the next week of work (June 7-12) and returned to work on June 15, 2004. She was treated by Dr. Berger on June 7, June 8, June 10, and June 16 (not daily, as alleged by Kendall). The record does not show that Dr. Berger imposed any lifting

restrictions on Bradford due to this injury.

We affirm the Commission's finding that Bradford failed to prove that she suffered a compensable injury on June 5, 2004. This issue hinges on witness credibility, the resolution of which lies within the exclusive province of the Commission. *See Shaw, supra*. While Bradford accurately points to contradictions in the testimony of appellee's witnesses, especially in Kendall's testimony, she ignores a very salient contradiction between her *own* testimony and Dr. Berger's June 7 notes: Bradford testified that she reported to Nelson that she hurt herself at work on June 5, but she told Dr. Berger on June 7 that she did not report to her employer that she hurt herself on the job. While a claimant is not required to prove that he reported the injury to his employer, his failure to do so is a matter of credibility for the Commission to determine. *See Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998)(*overruled on other grounds*).

If the failure to report an injury is a credibility matter for the Commission to determine, then so, too, is the resolution of contradictory versions of how the injury occurred. While Bradford asserts that it is "unlikely" that a person would report to her employer that she was in a car wreck and then later report to her chiropractor that she was injured at work, that assertion is belied by the record in this case. The contradiction between Bradford's testimony and her medical record provided a basis for the Commission to doubt Bradford's testimony that she sustained the June injury while working. According, we affirm the Commission's finding that Bradford failed to prove her June 5, 2004 injury was work-related.

II. August 17, 2004 Injury

We also affirm the Commission's finding that Bradford failed to prove she suffered a compensable injury on August 17, 2004. For a claimant to prove that she sustained a "compensable injury," she must show that she suffered an accidental injury causing internal or external physical harm that arose out of and in the course of employment that required

medical services and that this injury was the result of a specific incident and is identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2005). The compensability of the injury must be shown by objective medical findings. Ark. Code Ann. § 11-9-102(4)(D).

An aggravation is a new injury resulting from an independent incident. *Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000). Under workers' compensation law, an employer takes the employee as he finds him, and employment circumstances which aggravate preexisting conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Id.*

Here, the Commission did not err in finding that Bradford failed to prove that she suffered an aggravation or a new compensable injury. Unlike the June 5 injury, it is undisputed that on August 17, Bradford reported a work-related injury to both appellee and her doctors. Whereas she reported pain, numbness, and tingling primarily on her right side following the June 5 incident, she primarily reported symptoms on her left side following the August 17 injury. In addition, objective medical tests conducted on August 27, 2004, revealed nondegenerative changes to other disks that were not affected by the 1998 car wreck. Nonetheless, Bradford failed to prove the causal relationship between her August 17 incident and her neck symptoms. A claimant is not required to prove the causal connection between her job and her injury by objective medical findings where objective findings establish the existence and extent of an injury and a preponderance of the remaining evidence establishes the causal connection. *See Horticare Landscape Mgmt. v. McDonald*, 80 Ark. App. 45, 89 S.W.3d 375 (2002). However, here, the *only* evidence of a causal connection between Bradford's August 17 injury and her neck conditions is her testimony,

which the Commission apparently did not credit in this regard.

Further, no objective diagnostic tests were conducted immediately following the June car accident. Hence, the Commission would be required to speculate in order to conclude that the objective findings that were found after August 17 were caused by the August 17 injury, especially in the absence of any medical evidence establishing the causal relationship between the August 17 incident and Bradford's degenerative and nondegenerative neck conditions. Because a finding of a compensable injury cannot be based on speculation or conjecture, *see Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002), the Commission did not err in determining that Bradford failed to prove that she suffered a compensable injury on August 17, 2004.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.